

MONTANA PUBLIC DEFENDER COMMISSION

State Capitol Room 152
Helena, MT

July 15, 2013

DRAFT MINUTES

Commissioners Present

Ann Sherwood, Pablo; Margaret Novak, Chester; Charles Petaja, Helena; Richard (Fritz) Gillespie, Helena; Brian Gallik, Bozeman; Christopher Daem, Billings; and Kenneth Olson, Great Falls

Commissioners Absent

William Snell, Billings; Majel Russell, Billings

Staff Members Present

William Hooks, Chief Public Defender; Wade Zolynski, Chief Appellate Defender; Kristina Neal, Conflict Coordinator; Harry Freebourn, Administrative Director; Jenny Kaleczyc, Regional Deputy Public Defender, Helena; Chris Thomas, Eligibility Determination Specialist

Liaisons

Eileen Larkin, liaison for non-management appellate defender staff and attorneys, was in attendance. The union attorneys, support staff and investigators were not represented.

Interested Persons

Brent Doig, Budget Analyst, Office of Budget and Program Planning (OBPP); Scott Crichton, Executive Director, American Civil Liberties Union of Montana (ACLU); Niki Zupanic, Public Policy Director, ACLU; Timm Twardoski, Executive Director, American Federation of State, County and Municipal Employees (AFSCME)

1. Call to Order

The Montana Public Defender Commission meeting was called to order by Chairman Fritz Gillespie at 9:05 a.m.

2. Approve Minutes of February 15, 2013 Meeting (*Action Item)

Commissioner Petaja moved to approve the minutes as drafted. Commissioner Daem seconded and the motion carried.

3. Performance Audit Update

The performance audit conducted by the Legislative Audit Division focused on two items: the contracting process and the eligibility determination process. The audit evaluated whether the agency complied with its own policies and standards and with state law. The audit report identified a number of problems in terms of uniformity and consistency, and the agency concurred with many of their recommended changes in its response. The LAD will conduct follow-up site visits in the fall to assess the agency's progress.

Chief Public Defender Bill Hooks is keenly interested in maintaining a hands-on approach to the contractor work force. As caseloads continue to rise and the FTE workforce can't keep pace, the contractor pool is increasingly critical. Ensuring that contractors aren't becoming as overloaded as the FTE workforce is difficult to monitor because the percentage of OPD caseload vs. private cases varies from 10-100% based on the contractors' self-reporting. Contractors aren't required to accept OPD cases, so they do a certain amount of self-regulation. The agency is also developing new reports to track the number of OPD cases assigned across

regions and through the conflict office which will help to monitor the number and types of OPD cases a contractor accepts even if the number of private cases (and thus the total workload) is unknown.

The second area of inquiry during the audit was the eligibility determination process. Commissioner Petaja asked if there was any reason to believe that OPD is representing people who do not qualify for services. Chief Hooks said that is an untrue perception. Although there may be a very few that slip through, there is often information relating to the determination that can't be disclosed to the public. The severity of the charges are also a factor in hardship determinations. The lack of documentation and uniformity that the auditors found are being addressed through the development of a new application form that should improve compliance, as well as improved procedures for hardship determination. However with only 11 people designated as eligibility determination specialists verifying information for 25,000 new cases each year, there will still be issues. The statute permits contracting for the eligibility determination function, so that avenue will be investigated, although in all likelihood it will continue to be done in-house.

A. Cost Recovery Exception

The agency has requested an exception to the state policy relating to procedures for accounting for accounts receivable and identifying and collecting bad debt. Since OPD doesn't collect social security numbers, the Department of Revenue won't accept accounts for collection. The agency is also not in a position to determine what a bad debt is, since the court orders payment and must determine if the debt is uncollectible. If the exception is granted, OPD will only have to track the money deposited into the special revenue account, rather than maintaining individual accounts for each judgment. Chairman Gillespie said that it is the responsibility of the clerk of court to keep track of whether payments are made so they can report to the judge.

4. Commission Questions/Comments on Submitted Reports

A. Chief Appellate Defender Report

Chief Appellate Defender Wade Zolynski gave highlights of his detailed written report. Turnover remains crippling, especially support staff. Shortly into his tenure, all of the institutional knowledge walked out the door and wasn't written down anywhere. He conducts weekly staff meetings to try to improve morale and has reclassified the support staff positions. The FY 13 numbers aren't final but the estimated caseload increase is about 20%. Another attorney has been hired to work in the Missoula office in attempt to recruit and retain staff since Missoula is a desirable place to live.

Chief Zolynski discussed the overwhelming workload of the chief appellate defender position. It is too much to maintain over the long-term, and he has started to use senior appellate defenders to help absorb some of the administrative workload and create institutional memory beyond the chief. In that spirit he has established a committee to review trial counsel requests for writs of supervisory control, and then decide if a writ should be filed. He also recommends reducing or eliminating the chief's caseload.

Chairman Gillespie asked appellate liaison Eileen Larkin to offer her opinion. Ms. Larkin explained her process for inviting appellate attorneys and support staff to submit items for her to bring to the Commission. Her colleagues had no issues to submit for this meeting. The attorneys had an opportunity to provide input on the proposed appellate case weighting system and there were no objections to the final draft.

In regard to reorganizing the office to alleviate the chief's workload, Ms. Larkin gave her personal comments, not as the liaison representing her coworkers' opinions. She served as acting chief while the previous chief was on leave and decided not to apply for the job when it opened. She has been stunned at the amount of work involved, and said that it is not sustainable. Her concern is that the next turnover crisis will be in management. Due to the support staff crisis, Chief Zolynski, Ms. Larkin,

and other assistant appellate defenders were performing support staff functions (in addition to their own increased caseloads) such as pulling tables on briefs, formatting, copying and binding them to fulfill their ethical obligation to ensure that briefs are filed correctly and on time. One way that she and others have handled the high caseloads is to file motions for extension of time to file briefs. The Court has been understanding to date, but that does not diminish her concern that clients are waiting too long for her attention to their appeal. She has the utmost respect for Chief Zolynski as a manager and for his ability to keep the focus on client representation despite the heavy workload and the turnover challenges they have faced.

Chief Zolynski responded to questions from the Commission. He thinks that the promise of increased attorney pay has stemmed the turnover tide for the time being. However, the support staff will get only the 3% and 5% increases negotiated for all state employees, without an increase in the pay ladder. Increased contract dollars have been used to offset the attorney turnover and high caseloads. It is more difficult to contract for support staff duties, although there are some agencies in Helena that offer temporary services. Ideally, an additional attorney would allow him to reduce his caseload and spread the administrative duties. Realistically, he'll continue to use contract attorneys to reduce some of the caseload stress. He would like to implement a three-tiered attorney system with the highest level taking on administrative responsibilities. He is waiting to hear what happens with the trial attorneys' contract; he can't create significant pay disparity between the two programs.

i. **Proposed Appellate Case Weighting System (*Action Item)**

Chief Zolynski distributed new appellate case weighting forms for the Commission's consideration. One is for direct appeals, and the other is for writs, etc. He designed the weighting system to closely follow a formula and give the chief minimum discretion in assigning the weights. The recommendation is a maximum of 22 units per year. Chief Zolynski has been piloting the forms for about a year and one attorney has 60 units. This is a strong caution sign that something is wrong and gives him the ability to start the conversation about limiting cases. In addition, having this tangible number helps in making case assignments.

There was discussion about the possibility of pro bono attorneys taking on appellate work to ease the workload. Chief Zolynski has some reservations about this approach. Chairman Gillespie asked him to think it over and discuss it again at the next meeting.

Commissioner Olson moved to approve the appellate case weighting system as presented. Chairman Gillespie invited public comment and there was none. Commissioner Gallik seconded and the motion carried.

B. *Conflict Coordinator Report*

Conflict Coordinator Kristina Neal continued to see a high number of cases through FY 13—approximately 5,000 cases for the year. In regard to the earlier discussion regarding contractor caseloads, Ms. Neal has the ability to see a contractor's entire OPD caseload in the case management system before assigning a case, and she will check it especially for attorneys who accept regional as well as conflict work. Then she can at least have a conversation with the attorney about their ability to take additional cases.

i. **Standards for Stand-by Counsel (*Action Item)**

Ms. Neal presented proposed revisions to the standard in response to some situations she encountered in the past year. Item F and paragraph 3 are new. The revisions clarify for the attorney and the court that regular client/lawyer relationships do not apply when acting as stand-

by counsel. It limits the role of stand-by counsel and makes clear that they are appointed by the tribunal.

Commissioner Sherwood asked if there is no attorney/client relationship at all. Ms. Neal said that there is a relationship to the extent that anything the client says remains privileged, but stand-by counsel has no obligation to file motions, do investigations, etc. She will change the language to reflect a “modified” attorney/client relationship and resubmit the standard for the Commission’s approval at the October meeting. Chairman Gillespie asked Ms. Neal to cite sources for future reference in the standard.

This standard only applies to OPD contract and FTE attorneys, not to private counsel acting as stand-by counsel. However the courts usually appoint OPD, and either the regional deputy or Ms. Neal assign an attorney depending on whether there is a conflict. Chairman Gillespie suggested that financial eligibility should be determined when OPD is appointed as stand-by counsel.

Commissioner Novak moved to implement the standard immediately, with the final language to be approved in October. Commissioner Olson seconded and the motion carried.

C. Chief Public Defender Report

Chief Hooks addressed a number of issues in his report, and he would be glad to answer any questions on those issues. He also wants to give an overview of the interrelated issues facing the agency, most of which are in a state of flux.

Going into the legislative session, turnover was a big concern, partly due to low salaries and excessive caseloads. Turnover may be somewhat alleviated by the upcoming pay changes, and the collective bargaining process should be wrapped up soon. The Commission’s recognition of the excessive caseloads and their willingness to take action was appreciated by staff. Chief Hooks has encouraged management to talk to attorneys about caseloads that reach the 125 mark or when the stress level reaches the critical point.

The contractor work pool is also important. In some regions there is an adequate contractor pool, so that helps when there is a big spike in cases, but that isn’t the case in Helena. However, even where excess caseloads can be alleviated by using contractors, it impacts the conflict coordinator’s ability to assign cases to them. Last year every region exceeded their contract dollar budgets, so at a certain point more money and/or people may be required.

i. Update on Ethical Caseloads and Refusal of Appointments

Chief Hooks is working on a draft motion and brief to limit new cases in Region 4 (Helena). He is monitoring court actions in other states and trying to use arguments that have been successful. The motion will be based on factual narratives, and will ask for systemic relief while ensuring that ethical obligations are fulfilled. He doesn’t want to put FTE attorneys into a position where ineffective assistance of counsel complaints might be filed.

There was discussion regarding the possibility of a lawsuit to require the legislature to provide adequate funding for the agency. This is not only something that OPD cannot initiate, but it would be a lengthy process in any case. Chief Hooks needs a more immediate response, and he thinks the judges will be understanding, because they are overworked too. The agency must be as efficient, economical, and well-managed as possible to demonstrate that the issue is not a lack of management, but a lack of resources.

D. Contract Manager Report

Contract Manager Larry Murphy was in Butte because it was the last day for paying FY 13 bills. Chief Hooks reported that they are trying to refine contractor processes to address issues identified in the performance audit. It is a big task. There is also an ongoing discussion regarding OPD's degree of oversight and what the process is for a contract attorney working an OPD case to withdraw.

E. Training Report

Training Coordinator Eric Olson was presenting a training in Louisiana to assist them in reconfiguring their system. Chief Hooks said that the recent PCR training was the finest he has attended in Montana, and he is glad to see that the pool of available attorneys to do this work has expanded. Other upcoming training events include a dependent neglect workshop, involuntary commitment training at the Montana State Hospital, juvenile defense training, and the third and final phase of the federal grant-funded capital defense training. The filing on the prison homicide last week brings the number of OPD capital cases to three, so this training is much needed.

Regrettably, Mr. Olson has decided to transition to greener pastures, although the timeline is still up in air. He has done extraordinary work since the agency's inception and it will be reflected in the agency long after he is gone. Chairman Gillespie also recognized Mr. Olson's contributions to the agency on behalf of the Commission.

F. Financial and Operating Status

Administrative Director Harry Freebourn reviewed the preliminary operating report through March 31, with estimates for year end. He noted that only 6 of 11 modified FTE were approved for permanent positions by the legislature. Much of the increase in contractor costs are death penalty related. The legislature did not restrict use of the supplemental funding, although it is within their authority to do so. The case counts for the Appellate office might actually be December figures rather than March numbers. Once the books are closed the final unaudited numbers will be available and will be presented at the October meeting.

5. 2015 Biennium Operating Plans

Mr. Freebourn summarized the process for developing the operating plans. The Budget Items Worksheet shows the evolution of the Commission's budget request from the first draft in April, 2012 through final legislative action. At the end of each legislative session, current needs are assessed and the appropriation is allocated to best serve those needs. The operating plans can't be finalized until the FY 13 books are closed and union contracts are ratified (payroll costs represent 60% of the budget).

At this time there are three challenging areas:

1. Capital defense was funded at only \$250,000, half the requested appropriation. However, unlike other funds, this can be shifted between fiscal years. The current estimate is that costs will exceed the appropriation by \$1.3 million for the three existing capital cases.
2. Rather than providing additional FTEs as requested, there is a large appropriation for contract dollars. These funds are not restricted, although there is legislative intent to use it for contract services and not for payroll.
3. The career ladder increase for Programs 1 and 2 was insufficient to allow attorneys to move up the ladder in the second year (FY 15) by about \$300,000. In addition, there was no appropriation for management pay increases, so some managers will be making less than the employees they supervise when the pay ladder changes are implemented.

The agency will be required to report on two issues during the interim: use of capital defense funds, and turnover statistics (to determine if the salary appropriation is increasing retention).

Chairman Gillespie emphasized that the agency doesn't unilaterally decide to spend whatever is needed and assume the legislature will approve supplemental funding to cover the excess. The process is to advise the Governor's budget office when a supplemental situation is approaching, and then to notify Senate Finance and Claims. A supplemental condition is never deliberately created, but certain things cannot be anticipated, such as the large increase in caseloads in the last biennium. However, in this biennium the capital defense appropriation is practically a preconceived supplemental, since only half of the request was funded.

A. Proposed Operating Plan, Conflict Office

Ms. Neal proposes to curb the spike in contract dollars in north central Montana by hiring a modified FTE in Great Falls to handle conflict cases in Regions 3 (Great Falls) and 6 (Havre), and possibly Region 7 (Lewistown). There has been a consistent increase in cases and there are a limited number of contract attorneys available in those regions. Most of the current contractors limit the number of OPD cases that they will take due a combination of issues including the low contractor rate and lively private and/or CJA practices. The modified FTE would represent the non-offending parents in DN proceedings and also act as Ms. Neal's backup when she is out of the office.

B. Proposed Operating Plan, Program 2 (Appellate Defender)

Chief Zolynski is also considering hiring a modified position to handle support staff duties. It is very difficult to contract for that type of work. The modified attorney position that was already on board was made permanent, and the legislature approved one additional attorney. He may need more attorneys than that, especially if the caseload increase continues at the same pace. Staff compensation was discussed earlier, and the competitive attorney level 3 would take on some administrative duties.

The agency uses Lexis Nexis as a research tool, but Chief Zolynski plans to purchase WestLaw licenses for the appellate office at a cost of about \$10,000 per fiscal year. The two outstanding features for his office are formatting briefs and a searchable brief bank. It also has a notification feature if a citation from a previous brief has changed.

Training specific to the appellate office has been sparse in past years. Chief Zolynski proposes sending one assistant appellate defender to a national training event each year, with the expectation that the attendee will share their new expertise with their colleagues.

C. Proposed Operating Plan, Program 1 (Public Defender and Central Services)

Chief Hooks engaged in discussions with each department and with the regional deputies to understand case trends and identify the needs in each area. No one can keep up with the workload at the current FTE level. He may convert some of the contractor dollars to modified FTE positions, but that would be a stop gap measure until the next session. He is considering opening a Glasgow office with two FTE in response to the Bakken boom. There are few contractors in that area, and FTE are more cost efficient and easier to budget in comparison to contractor dollars.

Central Services functions are being reviewed for improvement and cost-efficiency as well. The training program would provide more bang for the buck with web-friendly, desktop training which could also reach contractors, rather than spending the bulk of the training budget on an annual conference.

The Commission can expect all of the operating plans to be finalized by the October meeting.

Budget Director Dan Villa stopped in, and on behalf of the Governor and the entire administration, he thanked the Commission for the work they do. He said they have always done the best they can with the available resources. Mr. Villa said that his door is always open to meet with the staff and the chair. He invited questions.

Chairman Gillespie said that the perception legislators have of the agency is a frequent subject of discussion. He asked Mr. Villa, as a former legislator and now as budget director, how best to approach the legislature to successfully get what the agency needs. Mr. Villa said that section D agencies are entities without advocates. People using those services don't have lobbyists and section D agencies often take budget cuts. There is a general understanding that those agencies will often be in a supplemental situation. He suggested continuing to use the incremental approach to funding unless there are substantial changes in the crime or indigency rates. This session the attorney salary increase was funded; next session, look at other needs and continue to legitimize the services, express the necessity, and ensure that the agency is meeting constitutional muster.

6. Public Comment

There was no public comment.

7. Committee Reports

A. Contracts Process

This committee, chaired by Commissioner Petaja, met in June and July. They are trying to develop a new contractor rate for attorneys based on solid analysis.

At the committee's request, Mr. Freebourn gathered information on other rates and developed a worksheet to weight those rates, based on their relevance to OPD. Assigning those weights by percentage is a decision for the committee and ultimately the Commission to make.

Commissioner Petaja feels strongly that this is the right time to adjust the contractor rate considering the substantial increase that FTE attorneys will see in FY 14. He believes that a rate increase will significantly increase the number of contract attorneys available to take OPD cases. The committee will bring a proposal for approval by the full Commission to the next meeting. The ideal rate that is adopted will be used in the next legislative session in the same way that the data on FTE salaries was presented during the recent session to obtain funding for the attorney pay ladder.

The Commission will also know at the October meeting how much funding, if any, will be available to implement an increase in the current biennium. Every dollar increase in the rate equates to about \$100,000 based on current estimates.

B. Standards

Chief Hooks has concerns about the current standard that allows for very limited representation in ancillary or collateral proceedings. When OPD is appointed in a criminal case or in juvenile or dependent neglect matters, there are sometimes questions about what the scope of representation can be other than the specific OPD case assignment. Although Chief Hooks is reluctant to embrace more work in an overloaded system, there are times when it would be to the client's advantage to be involved in collateral proceedings. The Standards Committee instructed Chief Hooks, Chief Zolynski and Ms. Neal to develop a draft revision to the ancillary standard for discussion at the October Commission meeting.

Chairman Gillespie cautioned that any expansion of ancillary representation must align with the agency's statutory obligations.

C. Eligibility and Cost Recovery

Chairman Gillespie had nothing to add regarding cost recovery following the morning discussion regarding the exception request.

i. Approve Revised IQ Form (***Action Item**)

Commissioner Gallik is working with Eligibility Specialist Chris Thomas to revise policy and procedure related to the application process. Ms. Thomas provided him with a wealth of material from other states, law reviews, etc. and it is a bigger project than he expected.

Ms. Thomas revised the application based on her research and with the intention of streamlining the process for OPD staff. In most offices eligibility determination is one of many tasks support staff are performing. The form has been reduced to one page and requests additional information that will allow the eligibility technicians to base both financial and hardship determinations on facts. Approval of the new application is the first step in improving the process and making it more uniform statewide. Revised policy and procedure, a training manual and a training program will follow.

Presumptive eligibility is a new component of the application form. The client will be required to provide proof that they are receiving other services to qualify for presumptive eligibility because at this time OPD doesn't have direct access to other agencies' information (e.g. SNAP eligibility).

Ms. Thomas has been visiting the regional offices to assess their unique challenges and share some best practices. Chairman Gillespie asked her to document that information to demonstrate the difficulties the agency faces in making 25,000 eligibility determinations each year. It will be useful in the next legislative session—if legislators are really concerned that OPD represents people who are not eligible for services, the agency needs to demonstrate why it is having trouble making accurate determinations. However, the perception that OPD serves people who shouldn't qualify will persist because observers don't know the personal situation of every applicant.

The Commission discussed denying services based on "substantial abuse," such as in the bankruptcy statute, or because of inadequate finances due to poor lifestyle choices. Chairman Gillespie cautioned that OPD is the agency responsible for providing counsel to those who can't afford it—regardless of poor choices. Commissioner Gallik agreed that that policy and procedure must err on the side of providing counsel to those in need.

Commissioner Novak moved to approve the revised form as submitted. She clarified that approval means that that form will be implemented, and that was the consensus. Commissioner Sherwood seconded and the motion carried.

ii. Use of IQ Information in Ability to Pay Hearings/Revise ARM 2.69.301

The Commission discussed many issues related to fee assessments and ability to pay. Commissioner Petaja remains concerned that the statute allows fee assessments at all, when OPD clients have already been determined to be indigent. Chief Zolynski pointed out that the flat fees in the statute apply only to a guilty plea, and by going to trial an hourly rate can be imposed. This could be a constitutional issue because of the chilling effect. Raising appropriate objections regarding determining the ability to pay at the trial level are important in light of the *Yarlott* decision. The number of courts imposing fee assessments seems to be increasing, and Mr. Freebourn will provide data on the courts currently assessing public defender fees.

Chairman Gillespie believes that using the information gathered on the application form would be appropriate in ability to pay hearings. The current policy is that the form is confidential, and it is separated from the case file. Under the existing administrative rule, the applicant may request judicial review of OPD's determination, in which case the form is submitted to the court for in camera inspection. However, if the public defender had access to the information on the application and the

supporting documents, it might be helpful in an evidentiary hearing on the ability to pay fees. One concern is that if a prosecutor believes that the public defender is coming to the sentencing hearing with information collected at the beginning of the case they will want to pursue discovery. Chairman Gillespie wants to make sure the attorney has the information they need to provide effective assistance in the ability to pay hearing as well as at sentencing. However there was concern that the information on the form doesn't relate directly to the ability to pay, since the statute says that it should reflect on the financial burden for the family, not just for the client, which is not the same qualification as the eligibility statute. In addition, the information gathered to determine eligibility could be several months old and no longer applicable at sentencing.

The Commission will make this an action item to take a formal position at the next meeting.

D. Collective Bargaining Update

Chairman Gillespie asked Chief Hooks to give a collective bargaining update. Chief Hooks prefers not to comment on specifics while negotiations are ongoing, but he believes both attorney and support staff negotiations are going well. Commissioner Petaja is also involved in the negotiations and he agreed that they are moving along and he expects to be done soon.

8. Commission Liaison/Executive Board Reports

Ms. Larkin had nothing to add to her earlier report. No other liaisons were present.

9. Old Business/New Business

*A. Election of Officers (*Action Item)*

Commissioner Gallik, Commissioner Novak, and Chairman Gillespie have applied for reappointment to the Commission but the Governor has not yet made appointments. The sense is that there is no competition for their seats, and that elections should proceed based on the assumption that they will all be reappointed.

Commissioner Petaja moved to retain Fritz Gillespie as Chair and Ken Olson as Vice-Chair. Commissioner Gallik seconded and the motion carried.

B. Review Committee Purposes/Appointments

Chairman Gillespie tabled this item until the October meeting.

*C. Pay Adjustments for PDC's Direct Reports (*Action Item)*

The 3% and 5% pay increases for all state employees effective July 1, 2013 and November 15, 2014 cannot be implemented for the Commission's direct reports (Chief Hooks, Chief Zolynski and Ms. Neal) without Commission approval. Additional pay decisions will be made following the performance evaluation process.

Commissioner Petaja moved to approve the Governor's 3% and 5% pay adjustment for Chief Hooks, Chief Zolynski and Ms. Neal. Commissioner Olson seconded and the motion carried.

D. Process for Performance Evaluation for Direct Reports

Chairman Gillespie would like to follow the process used in the past to evaluate the chiefs. A set of questions were distributed to subordinates for input, and the Commission took those into consideration while also evaluating performance of the statutory functions. Gathering outside input for the conflict coordinator is a subject for discussion by the Personnel Committee. The Personnel Committee will bring recommendations to the full Commission, specifically regarding pay adjustments,

and the performance evaluations will be conducted in executive session. The Commission supported this method of conducting evaluations by consensus.

10. Public Comment

No public comment was offered.

11. Set Future Commission Meeting Dates

A well-attended meeting was held at the law school when Jim Taylor chaired the Commission. The Commission agreed to hold the next meeting there in October or early November if space can be secured.

12. Adjourn

The meeting adjourned at 4:20 p.m.